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No. 76-1617

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM M. ORDNER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, although not contesting the fact that he was predisposed to commit the crimes for which he was convicted, contends that he was entrapped as a matter of law because of the "outrageous" conduct of the government. He further contends that, as he was a licensed federal firearms dealer and manufacturer who "could" have legally manufactured and possessed firearms, and as the government agents were themselves immune from criminal responsibility, 18 U.S.C. 2 was not intended to apply to his behavior.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of illegally possessing un-

serialed pen guns,[1] in violation of 26 U.S.C. 5842, 5845, 5861 and 5871, and one count of illegally transferring an unserialed pen gun, in violation of 26 U.S.C. 5811, 5812, 5845, 5861 and 5871. He was sentenced to concurrent terms of ten years' imprisonment on each count, subject to modification after a 90-day study to be conducted pursuant to Pub. L. 94-233, 90 Stat. 222-223, 18 U.S.C. 4205(c) and (d). The court of appeals affirmed (Pet. App.).

The evidence is accurately summarized by the court of appeals (Pet. App. 3a-5a). Briefly, it established that a combination of federal agents and local police officers, employing an elaborate ruse, persuaded petitioner (who was a licensed commercial blaster and firearms manufacturer) that they were members of the "mob" or "family" and were looking for weapons to sell. After an informant introduced petitioner to the agents posing as the "family," petitioner stated that he could supply the agents with a large number of pen guns and that he had dealt in weapons in the past. During the next month, petitioner supplied the agents with a blueprint and a sample pen gun, which he showed them how to operate; he helped locate a supplier of one of the component parts and supplied the other parts himself; and he helped assemble 502 pen guns from the two component parts. Petitioner also offered to supply the "family" with other types of guns. Petitioner's defense at trial was premised on alleged entrapment, coercion, and duress (Pet. App. 5a, 9a-10a).

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[1]A pen gun is assembled by taking the propulsion mechanism of a flare gun (commonly used by mariners for distress signal purposes) and adding a machined barrel to it, thereby converting the flare to a single shot weapon (Pet. App. 4a n. 3).

1. Petitioner contends that the evidence of his predisposition to possess and sell the pen guns, which the court of appeals found was clearly established,[2] was "irrelevant" in this case (Pet. 8) because the government's conduct was "so outrageous" that principles of due process barred his prosecution (Pet. 7, quoting *United States* v. *Russell*, 411 U.S. 423, 431-432). In *Hampton* v. *United States*, 425 U.S. 484, 488-489, the plurality opinion rejected "the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case * * * where the predisposition of the defendant to commit the crime was established."[3] In any event, petitioner does not identify the particular conduct that he characterizes as outrageous, and the record fails to support his claim.

Concededly, the agents in this case employed an elaborate pretense to persuade petitioner that they were members of the "family" or "mob" and could therefore be trusted. But it has never been held improper for agents to allay a willing participant's suspicions that he might be dealing with law enforcement officers. As the court of appeals observed (Pet. App. 8a), once petitioner was satisified about the agents' "identity," he "offered *without hesitation* to supply [them] with pen guns and

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[2]After reviewing the evidence, the court of appeals concluded that the jury could find that petitioner "was a willing and indispensable party in every step of the 'pen gun' operation" and that his actions were a "ready response to the inducement" offered him, so that there was "more than sufficient probative testimony" of his predisposition (Pet. App. 8a-10a).

[3]The two concurring Justices, although not embracing this "absolute rule" (*id.* at 495), agreed that "the cases, if any, in which proof of predisposition is not dispositive will be rare" (*id.* at 495 n. 7).

other firearms" (emphasis added).[4] Moreover, although the record is silent regarding whether petitioner was previously suspected of criminal activity at the time the agents first approached him (Pet. App. 5a), his statements to them suggested that he had dealt in weapons illegally in the past and that he had only "to reestablish his contacts" (*id.* at 4a). Thus, the agents' conduct, contrary to petitioner's suggestion (Pet. 7), did not "create [a] crime" where the potential for one was lacking; instead, the agents afforded petitioner an opportunity that he unhesitatingly embraced. That conduct did not constitute entrapment and was not so outrageous as to give rise to a due process claim.

2. Petitioner further contends that, because he was a licensed federal firearms dealer and manufacturer who "could" legally have possessed the 502 pen guns that he was charged with possessing in Count Three, and because the federal agents whom he caused to possess the pen guns were immune from federal prosecution, the provisions of 18 U.S.C. 2 do not apply to his behavior (Pet. 8-9). What petitioner "could" have done legally as a firearms manufacturer, however, is irrelevant to what he in fact did. The evidence established that petitioner designed and supervised the manufacture of the barrels for each of the 502 pen guns; he also helped the undercover government agents to screw the barrels onto the flare launchers that had been purchased at his direction, thereby converting the flare launchers into .25 caliber pen guns. At that point, the firearms had

[4]The lack of reluctance shown by petitioner distinguishes his situation from the situations in *Sorrells* v. *United States*, 287 U.S. 435, and *Sherman* v. *United States*, 356 U.S. 369, where the defendants resisted participation in criminal activity and succumbed only after continued urging by government agents.

been manufactured and could not be lawfully possessed because they did not bear serial numbers.[5] 26 U.S.C. 5842(b) and 5861(i).

Also irrelevant is the fact that the government agents could not themselves have been prosecuted for possession of the firearms. Subsection (b) of 18 U.S.C. 2 provides: "Whoever willfully causes an act to be done which if directly performed *by him* or another would be an offense against the United States, is punishable as a principal" (emphasis added). Thus, as the court of appeals concluded (Pet. App. 11a), petitioner "is responsible as a principal for causing the possession of unserialed firearms by Government agents, regardless of the fact that the Government agents were themselves immune from criminal responsibility."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[5]Petitioner's reliance on *Shuttlesworth* v. *Birmingham*, 373 U.S. 262, 265, is therefore misplaced, because possession of the unserialed firearms was not an innocent act.

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